

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

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UNITED STATES OF AMERICA : :
 : :
-vs- : Case No. 1:16-cr-289
 : :
ZACHARY L. SHAMES, : :
Defendant. : :
-----: :

SENTENCING HEARING

January 26, 2018

Before: Liam O'Grady, USDC Judge

APPEARANCES:

Kellen S. Dwyer and Catherine Alden Pelker,
Counsel for the United States

Thomas C. Hill, Kevin J. Quilty and Fabio Leonardi,
Counsel for the Defendant

The Defendant, Zachary L. Shames, in person

1 THE CLERK: The Court calls case 1:16-cr-289, the
2 United States of America versus Zachary Shames for sentencing.

3 May I have the appearance, please, first for the
4 Government.

5 MR. DWYER: Good morning, Your Honor. Kellen Dwyer
6 for the United States. And with me is Alden Pelker from CCIP,
7 she will be replacing Ryan Dickey, at least for the meantime on
8 both this case as well as the cases against Taylor Huddleston,
9 Ruslans Bondars and Jurijs Martisevs.

10 THE COURT: All right, good morning. Good morning to
11 you both.

12 MS. PELKER: Good morning, Your Honor.

13 MR. HILL: Good morning, Your Honor. Thomas Hill,
14 and my colleagues Fabio Leonardi and Kevin Quilty on behalf of
15 Zachary Shames, who is present as well.

16 THE COURT: All right. Good morning to each of you.
17 Good morning, Mr. Shames.

18 All right, this comes on for sentencing. Are the
19 parties ready to proceed?

20 MR. DWYER: Yes, Your Honor.

21 MR. HILL: We are, Your Honor.

22 THE COURT: All right, let's discuss first then the
23 enhancement of two levels for special skills that the Probation
24 Office determined was necessary under the Guideline
25 calculation.

1 Well, let me first ask, Mr. Hill, are there any other
2 objections to the presentence report other than the special
3 skill?

4 I understand that there is an objection generally to
5 paragraph 10 being included, which was the conduct of Mr.
6 Huddleston. And what's the basis for that?

7 MR. HILL: Excuse me, Your Honor, just one moment.

8 THE COURT: Yes.

9 MR. HILL: Your Honor, that would relate to -- and I
10 guess this is the other objection to the PSR. The intent to
11 obtain personal information enhancement which the Probation
12 officer has included, but the Government isn't seeking and we
13 are not seeking, so if the Court were to accept the joint
14 positions of the parties here, then we don't have an objection.

15 THE COURT: Okay. I am accepting that. I'm not
16 going to give the enhancement for the personal information, for
17 the intent to receive personal information.

18 So that --

19 MR. HILL: So that leaves special skills, Your Honor.

20 THE COURT: Okay. Then why don't you go ahead with
21 special skills.

22 MR. HILL: Certainly, Your Honor.

23 THE COURT: Well, let me back up. Are there other
24 objections to the presentence report, any of the information
25 generally in the report or other calculation errors that you

1 seek to --

2 MR. HILL: No, Your Honor.

3 THE COURT: Okay. Mr. Shames, have you gone over the
4 presentence report, sir?

5 THE DEFENDANT: Yes, Your Honor.

6 THE COURT: Any other additions, corrections that you
7 want to make to the report at this time?

8 THE DEFENDANT: No, Your Honor.

9 THE COURT: All right, thank you.

10 All right, then go ahead.

11 MR. HILL: Your Honor, I am going to rely principally
12 on the written materials that we've submitted. I don't want to
13 belabor the points and unnecessarily take the Court's time.

14 But I would say, I mean, the special skill
15 enhancement, we have two principal reasons why I don't think it
16 applies. First of all, as the commentary says, it should be
17 applied in circumstances that usually require substantial
18 education, training, or licensing. And then gives as examples
19 pilots, lawyers, doctors, accountants, chemists, and demolition
20 experts. We would suggest, respectfully, that none of those
21 apply in this particular case.

22 Your Honor, the overwhelming majority of the relevant
23 conduct, 82 percent, frankly, by calculation of the Government,
24 occurred when Mr. Shames was 16 and 17 years old when he was a
25 high school student when he had no formal training or education

1 related to computers.

2 The activities here are completely self-taught, if
3 you will, by going to Internet forums and Internet fora. There
4 is no education.

5 I would suggest to the Court, if we were standing
6 here, as we are now, six years later and we were talking about
7 offenses that were committed today, which we're obviously not,
8 then I would be much less vigorous in my argument because he is
9 a computer science major now about to graduate with a computer
10 science degree. And perhaps that qualifies as the substantial
11 education.

12 But certainly when he was 16 and 17 when the crux of
13 this case was developed, that was not the case.

14 THE COURT: Well, he certainly has developed over
15 time. He took great pains to develop his computer skills, I
16 agree with you, at 16 and 17 and also at 18, and was actively
17 pursuing his side business until the FBI knocked on his door.
18 And by that time, he had very legitimate, clear special skills,
19 right?

20 MR. HILL: Well, Your Honor, I would -- two responses
21 to that. First of all, as I said, the crux of this matter has
22 to do with his development and sale of this particular malware.

23 THE COURT: Right.

24 MR. HILL: Okay. 82 percent of those sales occurred
25 before his 18th birthday while he was in high school.

1 THE COURT: Nobody is arguing that he should be held
2 culpable for those sales. And I think that is totally
3 appropriate.

4 MR. HILL: And I would suggest equally, he did not,
5 within the meaning of the enhancement, did not possess a
6 special skill as it related to those activities.

7 THE COURT: At the time he began --

8 MR. HILL: And frankly, Your Honor, if you look at
9 the timeline, by the time he entered college, the activities
10 that were related to this offense, the 18 percent, if you will,
11 okay, was really -- had really tapered off significantly until
12 they came to a stop.

13 So it seems inappropriate, Your Honor, to apply that.
14 I mean, in effect, it seems to me what you're saying is -- or
15 what one would be saying, not you, is that being smart or being
16 skilled, in and of itself means that the enhancement should
17 apply. And I don't think that's what the enhancement is there
18 for.

19 Secondly, I would argue, Your Honor, that in order to
20 commit the offense of aiding and abetting computer intrusions
21 by developing -- the special skill, if you will, is built into
22 the offense itself. You can't commit the offense without
23 having the special skill, however it is that you developed that
24 special skill.

25 THE COURT: So what about the Government's arguments

1 that you could steal somebody's password and get into their
2 computer and --

3 MR. HILL: Well, under that --

4 THE COURT: -- and commit the offense?

5 MR. HILL: There may be a theoretical way of
6 committing the offense in that way, but I think you have to
7 apply it to the facts of this case and to the allegations and
8 the circumstances of this case, which have nothing to do with
9 that, and have everything to do with his development of the
10 malware and done, completely self-taught, while he was in high
11 school.

12 So again, without belaboring the point, Your Honor,
13 we would argue that those two points should not apply.

14 THE COURT: Okay. Thank you.

15 Mr. Dwyer.

16 MR. DWYER: Your Honor, first of all, the fact that
17 skills are self-taught is not and should not be a disqualifying
18 factor. That's what the Ninth Circuit said in Petersen. In
19 particular in the computer context, very frequently you have
20 self-taught people developing a lot of computer skills.

21 Secondly, in terms of the level of skill that went
22 into coding this malicious software, it was a lot. And what
23 attests to that is that there were 3,000 people, 3,000 people
24 who knew something about computers who were on these hacking
25 forums, who believed that his skill as a software developer was

1 sufficient for them to want to spend money to buy his Keylogger
2 because presumably they did not have the skills to code it
3 themselves. And that's why it's not theoretical, as opposing
4 counsel just said, that somebody could commit computer hacking
5 without having the skills.

6 Allowing unskilled people to commit hacking was the
7 point of this crime. The point of him developing this
8 Keylogger and selling it is that he's taking something that
9 would be difficult to hack into a computer and allowing his
10 users to do it very easily.

11 Using his Keylogger to commit computer hacking was
12 not difficult in the same way that using a Web site like
13 Facebook to share a photo is not very difficult. What's
14 difficult is being the person, the software engineer who codes
15 the photo sharing application. And that's the skill that he
16 brought to bear.

17 And it is significant, he is not being punished for
18 being smart, but he is being punished for using those talents
19 to exponentially increase the number of people who can commit
20 these types of crimes.

21 THE COURT: All right, thank you.

22 Well, I think that the special skill enhancement is
23 very appropriate here. I understand the timing of when Mr.
24 Shames developed the skills, that they weren't developed as a
25 lawyer or a doctor, as referenced in the Guideline calculation,

1 during training for a good purpose and the case law that talks
2 about that.

3 But I agree with the Government that the Petersen
4 case out of the Ninth Circuit, and O'Brien, and even the Godman
5 case out of the Sixth Circuit, we're in a new consideration
6 when we're talking about the training necessary to carry out
7 the skills that Mr. Shames developed for the purpose that he
8 did in this criminal enterprise.

9 He may have developed them when he was a juvenile,
10 but he continued to use them and to hone them -- I think the
11 e-mail exchanges that were part of the sentencing submissions
12 are so clear that Mr. Shames continued to work on his craft.
13 And that when purchasers had issues or they wanted assurances
14 that the malware would work against antivirus software that was
15 on the computers of those being hacked, he gave them those
16 assurances, and talked about it working on next generation
17 computers. And I think that those clearly fit within the
18 special skill enhancement, and continued as he was an adult.

19 And so, I find as a result the Guideline range is
20 ultimately, after acceptance of responsibility, is a 25. And a
21 Criminal History Category I. And the resulting Guideline range
22 is 57 to 71 months.

23 I have considered the submissions of the Government,
24 their original sentencing position, and also their motion for a
25 downward departure. I grant that motion and believe that Mr.

1 Shames is entitled to a reduction from any otherwise
2 appropriate sentence.

3 I have read the many submissions by defense counsel,
4 including the written submission and recommendation on
5 sentencing. And I see that there are many people here on
6 behalf of Mr. Shames and as well as his family.

7 And I will hear whatever else the Government would
8 like to say at this time on sentencing.

9 MR. DWYER: Just briefly, Your Honor.

10 The only point that I would like to respond to from
11 the defendant's sentencing memo is at the very end they have
12 cited a few cases of 1030 violations that resulted in
13 probation.

14 As you might imagine, that's not exactly a
15 representative sample of how courts have dealt with these types
16 of offenses. Mr. Hogue, which was the case out of the Southern
17 District of New York, I looked into that case, he had a
18 co-defendant or a defendant in a separately numbered case who
19 was actually the primary developer of the malware in that case.
20 And that person was sentenced to 57 months.

21 And I have pointed the case out to defense counsel.
22 They certainly don't think the case is on all fours, and I
23 wouldn't suggest that it is, but certainly there is -- folks
24 who are the developers of malware are not typically sentenced
25 to probation.

1 Mr. Culbertson, which is the case out of
2 Pennsylvania, there is less information on, but the offense
3 level there was 13 and the Guidelines were 10 to 16 months. So
4 it appears that it was not nearly as widely distributed of
5 malware as there was in this case.

6 And then Yelverton was not a malware developer. He
7 was someone who -- someone who hacked into a few -- I guess 50
8 computers. I shouldn't minimize it. But was someone who was
9 actually doing hacking, which was certainly a very serious
10 crime, but when you're talking about malware developers, you're
11 talking about someone who is enabling these sorts of crimes to
12 occur again and again and again.

13 And that's why at least the Government sees them as
14 being in a different category.

15 Thank you.

16 THE COURT: Thank you. All right, counsel.

17 Did you have any witnesses that you wanted to call?

18 MR. HILL: Not witnesses, Your Honor. I do want to
19 acknowledge the presence, as the Court has already done, of
20 many people, including Mr. Shames' parents, his sister, his
21 girlfriend and their family, many, many people who have also
22 written to the Court.

23 THE COURT: Go ahead, I merely --

24 MR. HILL: No, I understand, Your Honor. But I did
25 want to tell the Court that specifically with respect to his

1 current and future employer, ThreatQuotient, Mr. Kurtzman, the
2 CFO of ThreatQuotient, Mr. Couch, the senior vice-president of
3 strategy, and Mr. Colter, the director of technical alliances,
4 are here and are certainly available to answer questions for
5 the Court. I mean, I think they have expressed their views in
6 the form of their letters.

7 I guess what I'm saying is I'm perfectly happy to
8 have them testify if the Court would think that it would be
9 helpful to the Court.

10 THE COURT: Their positions were very clear, and I
11 read their letters carefully, and I don't have any questions
12 for them. And I have no doubt that Mr. Shames is doing exactly
13 what they say he is doing for them and that he will be an
14 excellent employee moving forward.

15 So I don't think there is a need to call them.

16 MR. HILL: Okay. In that event, Your Honor, no
17 witnesses.

18 THE COURT: Okay. Then please go ahead.

19 MR. HILL: Would you like me to proceed, Your Honor?

20 THE COURT: Yes, sir.

21 MR. HILL: Okay. And again, I know we've given you a
22 lot to read, and we really appreciate the Court's consideration
23 of all those materials. I will try to be brief and try not to
24 duplicate what I have already done in the written --

25 THE COURT: You take the time you believe is

1 necessary. It's an important matter.

2 MR. HILL: Yes, Your Honor. Thank you. I really
3 appreciate it.

4 Let me begin, Your Honor, by saying, in all
5 sincerity, in the 42 years that I have been doing this work,
6 first as an Assistant United States Attorney and as a defense
7 counsel, I have never seen a defendant who has been so
8 committed to making amends and trying to turn a bad situation
9 into a positive. He has been completely honest with me, with
10 the Court, with the Government, with his family, with his
11 employer, and most importantly perhaps with himself.

12 And I have never been more certain as I am with Zach
13 that he has and will continue to turn this unfortunate
14 experience into a positive one for himself and for the
15 community.

16 Let me turn to the two Guideline bases at least for
17 departure from the Guidelines. The Court has already
18 acknowledged the Government's motion under 5K. Your Honor,
19 that substantial assistance to the Government began really from
20 day one. It began when Zach completely confessed to the FBI.

21 I would also tell the Court, this is not one of those
22 situations that I think we've all been in and that happens all
23 too frequently where eventually the truth comes out, but it
24 takes -- it's quite a process for the truth to come out.

25 That wasn't the case here. Zach has been completely

1 and totally honest from day one. He has met with the
2 Government on a number of occasions, lengthy sessions.
3 Provided the Government all the -- answered all their
4 questions, provided whatever information he had.

5 He has testified in front of the grand jury. His
6 cooperation, Your Honor, has contributed to certainly the --
7 has contributed to Mr. Huddleston's indictment and subsequent
8 plea, I would suggest. Has contributed to the arrest,
9 extradition, and indictment of Mr. Bondars and Martisevs. I
10 apologize if I mispronounced that.

11 And Mr. Shames is committed, if called upon by the
12 Government, to testify if there is a trial in either or both of
13 those matters. Or for that matter, any other matters that may
14 come down in the future of which we are not aware currently.

15 The Government has indicated to the Court that Mr.
16 Shames' cooperation has been helpful to them in at least two
17 legally significant ways. It has helped establish venue in
18 this court in all the matters that I have just mentioned. And
19 he has been able to describe and will be able to describe how
20 these other defendants' products assisted the development and
21 distribution of malware.

22 I think there is absolutely no question that his
23 cooperation has been substantial, and important, and
24 continuing. And, Your Honor, it will continue as long as it is
25 called upon.

1 Let me turn briefly to other bases for the downward
2 departure. And under 5H1.1, as the Court is aware, age,
3 including youth, may be relevant in determining whether a
4 departure is warranted.

5 The Government itself in its sentencing memorandum
6 has recognized the applicability of 5H1.1. And I quote: The
7 Government does agree that the defendant's age is also a factor
8 that should be considered, and that the Court's consideration
9 of Sentencing Guideline 5H1.1 is warranted.

10 And the Probation Department acknowledges that as
11 well.

12 Mr. Shames was born on August 19, 1995. The criminal
13 conduct at issue here occurred -- began six years ago,
14 virtually to the day. I would ask the Court to look at Mr.
15 Shames and imagine this young man who is here today six years
16 younger and understand that the actions of a 16-year old and a
17 17-year old are not the actions of a mature adult. They are
18 not well thought out. The consequences of your actions are not
19 fully appreciated, and probably especially true of young men.

20 So I would suggest to the Court that a downward
21 departure based on 5H1.1 is very appropriate in this case.
22 82 percent of the conduct here occurred -- or the relevant
23 conduct occurred while he was a juvenile. Unfortunately, it
24 continued for a period of time, not a lengthy period of time,
25 and it was tapering off, but it continued beyond his 18th

1 birthday.

2 Frankly, had it ceased before his 18th birthday, we
3 wouldn't be here. As the Government acknowledges, the
4 Department of Justice policy is not to prosecute juveniles. We
5 would be in Juvenile Court in a state court in Virginia.

6 So, Your Honor, I believe that a downward departure
7 under 5H1.1 as well as a downward departure under 5K are both
8 appropriate.

9 And in analyzing what the sentence should be, taking
10 into account both of those departures, I would suggest that you
11 have to consider that or you should consider that in the
12 context of his overall -- the overall characteristics. He is,
13 as the Court recognizes I think from the letters that it
14 received, he is a kind young man. A bright young man. A
15 generous young man. An upstanding friend, family member.
16 People rave about him. And I think, frankly, were all shocked
17 when they learned about this.

18 But I think it is also important to understand that
19 he has been completely up front with all of those people about
20 what happened and maybe why it happened. And he has been
21 completely honest, again. And I think the honesty goes a long
22 way towards suggesting to the Court that this is someone who
23 truly has learned from his past indiscretions.

24 As I said before, he immediately confessed. He has
25 been honest all the way through. He has been honest with the

1 FBI. He has honest with the U.S. Attorney's Office. He has
2 been honest with his family. With me. He has been honest with
3 his employer. He has been honest with his university. His
4 cooperation is continuing.

5 Your Honor, his university, James Madison, told him
6 he needed to take a semester off when this became public. So
7 what did he do? He enrolled himself in Northern Virginia
8 Community College to take courses. He found a job, which we'll
9 talk about in a second. And now he is back in school for his
10 final semester, due to graduate in May with a degree in
11 computer science. He has made the Dean's List while all this
12 is going on. His academics have actually improved, again in an
13 effort -- his effort to make amends and to turn his life
14 around.

15 He is committed to doing community service, and has
16 done so voluntarily. He likes working with children and has
17 been working with children. You have the letter in front of
18 you from Second Home, which demonstrates the community service
19 he has been engaged in.

20 And finally, Your Honor. He had the good luck of
21 having an opportunity to try to get a job at ThreatQuotient,
22 the good guys. The people who -- the company that prevents the
23 kinds of activities that he was engaged in when he was 16 and
24 17 years old.

25 The Court has seen the letters, and I just want to

1 reference a few things from the letters. Mr. Kurtzman, the CFO
2 writes: I can unequivocally state that Zach Shames has been
3 the best intern that I have ever worked with. He is smart. He
4 is creative. He was an extremely hard worker. Zach and I
5 talked about his past actions, and I truly believe that Zach is
6 extremely remorseful for his past behaviors. He was put under
7 the spotlight at ThreatQuotient as well because we all knew of
8 his background, yet he excelled. We are enthusiastically
9 looking forward to the day that Zach can join our company as a
10 full-time employee after his graduation in May 2018.

11 Mr. Couch, his immediate supervisor and, frankly, the
12 person who was most probably, along with Mr. Kurtzman, most
13 responsible for hiring him, both of whom put their own
14 credibility on the line with the CEO who, frankly, was
15 ambivalent about whether or not this was an appropriate hire or
16 not, they both put their credibility on the line and said, we
17 think this is the right thing to do, we have interviewed him,
18 we have spoken with him. And that's exactly -- and Zach has
19 rewarded their confidence in him.

20 Mr. Couch, who has experiences in dealing with young
21 men who have had similar problems as Zach did in their younger
22 life, he says: I found that the deciding factor for me on
23 whether or not to hire them was motivation. Had they done it
24 for strictly financial purposes to inflict harm upon others?
25 Or were they just curious and creative with no positive

1 outlook? I met a very smart kid who was very curious and
2 creative with computer technology that took a wrong turn.
3 After working with Zach for about eight months now, I can
4 unequivocally say that he is one of the most talented and
5 stand-up young men I have ever met. For what it is worth, I
6 have experience with bad people intending to do bad things, and
7 that isn't Zach. He made a mistake and he is choosing to learn
8 from it. Zach has a ton of talent that can be redirected to
9 positively influence the world he comes in contact with, and I
10 would hate to see him receive a sentence that would negatively
11 impact his ability to be successful and become a mentor for
12 others in the future.

13 And then finally, Mr. Colter, another one of his
14 supervisors: I have no doubt that if given the opportunity,
15 Zach will continue to use his energy, commitment, and
16 dedication to do good in the community and make amends for his
17 past behavior.

18 Your Honor, I would submit to the Court that Zach is
19 really the model of how the criminal justice system should
20 expect and wants to expect offenders to respond to their
21 misdeeds. He has a bright future. He can and will be a huge
22 help in combatting exactly the kind of criminal behavior that
23 brings him before the Court. It is hard for me to imagine a
24 more productive result of this unfortunate event.

25 Your Honor, with all due respect, we would submit

1 that his substantial assistance to the Government, his age, his
2 own rehabilitative efforts, all warrant a probationary sentence
3 with whatever conditions of probation the Court were to deem
4 appropriate.

5 Your Honor, just briefly, Mr. Dwyer made reference to
6 the three examples that we cited in our sentencing memorandum.
7 We certainly didn't intend them to be exhaustive. We wanted
8 the Court to understand that other courts confronted with what
9 we believe is similar activity -- and, frankly, somewhat less
10 sympathetic activity given the fact that three that we cited
11 all were people where the entirety of the conduct occurred when
12 they were adults. Okay.

13 Mr. Dwyer made reference to the case out of
14 Pennsylvania, the Carnegie Mellon student, Mr. Culbertson, and
15 made reference to the Sentencing Guidelines. Well, fortunate
16 for Mr. Culbertson and unfortunate for Mr. Shames, the Western
17 District of Pennsylvania has a very different way of
18 calculating loss for purposes of these cases. And that
19 explains, frankly, the Guideline calculation in that case.

20 And finally, Mr. Dwyer is right, last night he called
21 me and said he might mention the Yucel case to the Court, which
22 is the co-defendant to Mr. Hogue.

23 Your Honor, if anything, I would suggest that the
24 Yucel case is such a stark contrast to Mr. Shames' case that it
25 really shows why a probationary sentence for Mr. Shames is the

1 appropriate sentence.

2 Mr. Yucel was the developer of what is known as a
3 RAT. Okay. He was the head -- this comes from the
4 Government's papers. He was the head of an international
5 criminal organization known as Black Shades. He employed
6 several paid administrators, including a director of marketing,
7 a Web site developer, a customer service manager, and a team of
8 customer service representatives. He hired and fired
9 employees. He generated sales of more than \$350,000. And I
10 believe it was a half a million computers that were infected.
11 Okay.

12 He, Mr. Yucel, personally used his own software to
13 infect computers. Zach certainly did not. Mr. Yucel did not
14 cooperate and did not receive a 5K motion as Zach did. The
15 Guideline range in Mr. Yucel's case was stipulated at 70 to
16 87 months by both the Government and the defense as part of the
17 plea agreement.

18 During sentencing the Government noted: What strikes
19 me here is really the lack of mitigating circumstances in Mr.
20 Yucel's case.

21 I suggest that what should strike the Government here
22 and the Court here is the abundance of mitigating
23 circumstances.

24 And finally, with respect to Mr. Hogue, the
25 co-defendant who did get probation, the Government reflected

1 that he was the employee who extracted himself from the
2 organization for a significant amount of time, and yet Mr.
3 Hogue's involvement certainly in a criminal organization was
4 more significant, more substantial than Mr. Shames'. And yet
5 Mr. Hogue was given the probationary sentence in the Southern
6 District of New York.

7 So I think it is a perfectly appropriate case to have
8 cited to the Court. Okay. And I would suggest that when the
9 Government pointed me to the Yucel case, that that actually by
10 way of contrast, is exactly -- shows exactly why probation is
11 the correct result here as opposed to in the Yucel case where
12 it clearly wasn't.

13 Your Honor, this is an appropriate and just sentence,
14 probation would be, under all the facts and circumstances here.
15 The young man before you today is simply not the same boy,
16 teenage boy who committed this offense.

17 Your Honor, if the Court sentences Mr. Shames to
18 probation, I can guarantee you the Court will not regret that
19 decision.

20 Thank you.

21 THE COURT: Thank you, Mr. Hill.

22 Am I correct that there is no restitution that's
23 anticipated given the nature of the facts of this case, is that
24 right?

25 MR. HILL: That's right. There is a forfeiture

1 order, Your Honor, that does require financial payment, but
2 it's not a restitution order.

3 THE COURT: Right, it's not restitution to victims.
4 Okay. Thank you.

5 All right, Mr. Shames, please come to the podium.
6 This is your opportunity to tell me anything you would like to.
7 And please remain there when you're done. I have read your
8 letter to the Court.

9 THE DEFENDANT: Your Honor, I just want to begin to
10 apologize to you, the Court, the Government, and especially my
11 friends and family for putting myself in this situation and
12 everything that came with it.

13 I also wanted to say thank you to everyone who came
14 to support me. I really appreciate it.

15 I don't have too much to say other than what you've
16 already read in my letter to you, but I am incredibly
17 remorseful for what I did. I can't really say why I did it.
18 All I can think of is I was naive and I thought I was above
19 everyone. But I am not, and I realize that now. And I have
20 learned from that.

21 And I have taken the time to kind of reflect and
22 figure out how I can do more positive things in the future and
23 how I can make up for what I've done.

24 THE COURT: So there is a suggestion in the papers
25 that you really didn't understand the gravity of what you were

1 doing. I take it, you know, part of it was your age. But, I
2 mean, you understood that this Keylogger system, this malware
3 system was going to be used to steal people's identity, and
4 bank accounts, and cause them great upheaval in their own
5 lives, right?

6 THE DEFENDANT: Yes, Your Honor.

7 THE COURT: All right. So I have trouble -- I know
8 youth is -- believe me, I have personal experience with youth
9 and young men and their ability to really digest sometimes the
10 consequences of their actions. But even when you were 18 and
11 you're getting these e-mails from hackers, you're being asked,
12 is my system going to work against this? Is it going to work?
13 It was almost a pride of ownership and skill that came out of
14 those responses.

15 Tell me what was going on in your mind back then.

16 THE DEFENDANT: I think that I more or less dug
17 myself into a hole, and what I cared about back then was my
18 reputation among the community that I basically surrounded
19 myself when I was 16 and 17. And I think because of that, I
20 had to keep up the persona that I was putting out for being
21 that person and saying what I said in the e-mails.

22 THE COURT: So what you were doing with the money?

23 THE DEFENDANT: I put it away. I am not a big
24 spender. I didn't really do anything with it.

25 THE COURT: So what was the high? What was going on?

1 Why was this so exciting for you to do this?

2 THE DEFENDANT: I think, like I mentioned earlier,
3 the, if you want to say, prestige or the recognition from the
4 community that I was involved in --

5 THE COURT: The hacking community?

6 THE DEFENDANT: Yeah. That it was sort of an echo
7 chamber, and they appreciated it. And it almost -- I guess
8 that was the high. And the recognition was -- I guess I liked
9 getting it.

10 And if I -- looking back on it now, if I had some
11 sort of mentor or someone to guide me through what I learned
12 myself, I think it would have turned out much differently. But
13 the people who I surrounded myself with were the same people
14 who were not doing good things.

15 THE COURT: All right. I interrupted you. Are you
16 done?

17 THE DEFENDANT: I'm done.

18 THE COURT: All right. Well, this is a difficult
19 sentencing, as many, many are. This is what retires judges,
20 because they don't want to be here on days like this when cases
21 like this come up.

22 You have turned your life around, there is no
23 question. You are a fine young man today. You are well on
24 your way to becoming a wonderful member of our community. And
25 I am absolutely confident, as everyone here, either both from

1 the Government and from your support and of your family, is
2 assured. And if that was my only duty, you know, and I was to
3 sentence you based on your conduct after you got caught, then
4 this would be an easy decision, but it's not. And I have to
5 consider the offense, the harm that you caused others through
6 your actions, the need to deter others from being involved in
7 similar offenses.

8 The offense is, I mean, remarkably sinister. The
9 group that you got yourself tied in with and the acts that were
10 committed are really astonishing. I mean, much of it occurred
11 when you were 16 and 17 years old. The Government has
12 indicated that, correctly, that you shouldn't be held culpable
13 for any of those activities, but I can't not consider the fact
14 that it continued for almost three years.

15 And you went to the great lengths that we just talked
16 about to make sure your product was successful on behalf of
17 these hackers. I mean, 3,000 sales. 16,000 innocent people's
18 lives have been affected. Some I'm sure dramatically. Others
19 hopefully not as dramatically. The four million key log
20 reports, that's not something that I can ignore.

21 And that you stopped when you got caught. And again,
22 that's something that I need -- is important to consider.

23 So a sentence of incarceration is entirely
24 appropriate. The Government's recommendation is entirely
25 reasonable given the qualifier that you have cooperated, and a

1 5K1 has been filed on your behalf. That motion I grant. And I
2 think the reduction that the Government sought, again, is
3 reasonable.

4 I also believe that your counsel is correct that the
5 departure for your age is appropriate. And it's in large
6 amount considered in the papers of the parties, and in the
7 recommendation, and in the sentencing recommendation, and in
8 the qualification of the harm that you caused, but I think that
9 it should be considered further in the ultimate sentence.

10 I also think that your health is a concern. I am
11 concerned about the periodic six-month checkups that should be
12 performed by the professional family doctor who has been
13 successful in curing you, and that there should not be an
14 interruption of that service.

15 I am going to sentence you to six months of
16 incarceration.

17 Two years of supervised release. During that
18 supervised release, you will be on six months of home
19 confinement with electronic monitoring to be paid by you under
20 the direction of the Probation Office.

21 As other special conditions, I will order that you
22 undergo substance abuse testing and treatment as deemed
23 necessary by the Probation Office.

24 That if the Probation Office deems it appropriate,
25 that you agree to computer monitoring both at work and at home.

1 I don't believe it is necessary presently, but if it becomes an
2 issue, then it will be directed under the Probation Office.

3 That you allow the Probation Office to maintain
4 knowledge of all your finances and approve your obtaining
5 credit in the future.

6 There is a \$100 special assessment.

7 I am going to impose a fine of \$30,000, which will be
8 due and owing within the first year of your probation under the
9 direction -- paid under the direction of the Probation Office.

10 I believe that there is a forfeiture order that has
11 been agreed upon in the amount of \$69,000.

12 I will allow you to voluntarily surrender after June
13 1 under the direction of the Probation Office.

14 I will ask the Bureau of Prisons to send you to a
15 minimum security facility.

16 Mr. Hill, if you want some input into where you want
17 me to recommend, I am happy to make any recommendation that you
18 seek.

19 MR. HILL: We will, Your Honor. We have time, I
20 assume, to get you that recommendation?

21 THE COURT: Yes. I will direct in the sentencing
22 order that it be a minimum security facility. And then we'll
23 work with the Probation Office to get a suitable facility.

24 All right. Anything else this morning in this case?

25 MR. DWYER: Your Honor, there is a forfeiture order I

1 provided to defense counsel.

2 MR. HILL: We have it, Your Honor. And just so that
3 the record is clear, I think the amount is 61, not 69.

4 THE COURT: 61, all right.

5 All right, Mr. Shames, you have a great family and
6 terrific support. And I don't have any doubt I will never see
7 you again in this courtroom. And you are a resilient young man
8 as well, and I hope that the future holds wonderful things for
9 you, sir.

10 THE DEFENDANT: Thank you, Your Honor.

11 THE COURT: All right. We're in recess.

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13 HEARING CONCLUDED

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21 I certify that the foregoing is a true and
22 accurate transcription of my stenographic notes.

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24

25

/s/ Norman B. Linnell
Norman B. Linnell, RPR, CM, VCE, FCRR